DEC 12 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 621

HENRY LEVAUR, INC., COLT-BRADY COMPANY, AND BRADBURN MOTORS COMPANY,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION AND SUPPORTING BRIEF.

ALLAN SESERMAN,
Attorney for Petitioners,
1 Federal Street, Boston.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

	Page
Petition	1
Questions presented	2
Statutes involved	3
National Labor Relations Act	3
Commerce	3
Affecting commerce	3
Prevention of unfair labor practices	3
Board petitions to Circuit Courts of Appeal or District Courts—findings of facts, conclusive—additional evidence—appeals	4
Petition for review by an aggrieved party—copy of petition to the Board	5
Statement	6
Complaint	6
Answer	7
Hearings	7
Board's decision and order	8
Opinion and judgment of the Circuit Court of Appeals for the First Circuit	9
Petitioners' contentions	17
Reasons for granting the writ	19
Brief	22
Opinions	22
Jurisdiction	22
Questions presented	22
Statutes involved	22
Statement	22
Errors to be relied upon	22
Summary of argument	23
Argument	23
Point I	23
Point II	24
Point III	26

Page

Point IV 27
Point V 28
Point VI 30
Conclusion 31

TABLE OF AUTHORITIES CITED.

Associated Press v. National Labor Relations Board, 301 U.S. 103 23
Carter Carburetor Mining Corp. v. Federal Trade Commission, 112 F. (2d) 722 15
Clover Fork Coal Co. v. National Labor Relations Board, 97 F. (2d) 331 15, 16, 18
Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 13, 15, 16, 18, 27
Consumers Power Co. v. National Labor Relations Board, 113 F. (2d) 38 16, 29
Currin v. Wallace, 306 U.S. 1 15
Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 15
Denver Automobile Cases, 10 N.L.R.B. 1173 24
Lemke v. Farmers Grain Co., 258 U.S. 50 15
McCall v. California, 136 U.S. 104 16
National Labor Relations Board v. A. S. Abell Co., 97 F. (2d) 951 14, 18
National Labor Relations Board v. Bradford Dyeing Association, 310 U.S. 318 16, 18, 28
National Labor Relations Board v. Cowell Portland Cement Co., 108 F. (2d) 198 14
National Labor Relations Board v. Fainblatt, 306 U.S. 601 15, 16, 29
National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 27
National Labor Relations Board v. Gerling Furniture Mfg. Co., 103 F. (2d) 663 10n.

Page

National Labor Relations Board v. Hearst et al. (C.C.A. 9, 1939) 29
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 14, 15, 25, 27
National Labor Relations Board v. Norfolk Shipbuilding & Dry Dock Corp., 109 F. (2d) 128 14, 18
National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 24
National Labor Relations Board v. Pure Oil Co., 103 F. (2d) 497 10n.
National Labor Relations Board v. Sunshine Mining Co., 110 F. (2d) 780 15
Newport News Shipbuilding & Dry Dock Co. v. National Labor Relations Board, 101 F. (2d) 841, rev'd on other grounds, 308 U.S. 241 14, 18
North Whittier Heights Citrus Assoc. v. National Labor Relations Board, 109 F. (2d) 76 16
Santa Cruz Co. v. National Labor Relations Board, 303 U.S. 453 14, 15, 16, 18, 27
Schechter Poultry Corp. v. United States, 295 U.S. 495 23
Shierbrock Motors, In re, 15 N.L.R.B. 120 24
Southern Colorado Power Co. v. National Labor Relations Board, 111 F. (2d) 539 16
S. S. Kresge Co. v. Amsler, 99 Fed. 503 27
Texas N. O. R. Co. v. Brotherhood of Railway Steamship Clerks, 281 U.S. 548 23
Virginian Ry. v. System Federation No. 40, 300 U.S. 515 16, 23
Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142 24

National Labor Relations Act, Section 2 (6) 7
National Labor Relations Act, Section 2 (7) 7, 10
National Labor Relations Act, Section 8 (1) and (5) 7

Page

National Labor Relations Act, Section 10 (a) 10
National Labor Relations Act, Section 10 (c) (49 Stat. 453, 29 U.S.C. sec. 160 (c)) 9
National Labor Relations Act, Section 10 (e) 9, 22
National Labor Relations Board's Rules and Regulations—Series 1, as amended, Article II, Section 37 (b) 7
National Labor Relations Board's Rules and Regulations—Series 2, Article II, Section 36 8
Senate Committee Report No. 572 25

Supreme Court of the United States.

OCTOBER TERM, 1940.

No.

HENRY LEVAUR, INC., COLT-BRADY COMPANY, AND BRADBURN MOTORS COMPANY,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Henry Levaur, Inc., Colt-Brady Company, and Bradburn Motors Company, pray that a writ of certiorari be issued by this Court to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered in the above-entitled cause on October 25, 1940, enforcing an order of the National Labor Relations Board.

Questions Presented.

1. Whether the petitioners, by purchasing commodities for resale in the State of Rhode Island, even though the said commodities are sent into the State of Rhode Island from other States and resold in the State of Rhode Island, are engaged in interstate commerce, within the meaning of the National Labor Relations Act.

2. Whether in the absence of an effect upon interstate commerce and the absence of sufficient facts supported by evidence that certain unfair labor practices as alleged might lead or tend to lead to labor disputes, the National Labor Relations Board, by virtue of its authority as derived from the National Labor Relations Act, has jurisdiction to issue an order against the petitioners.

In other words, are the facts as found by the National Labor Relations Board that the respondents (petitioners here) are engaged in interstate commerce without showing an effect upon that commerce sufficient to enable it to enter an order against the petitioners to cease and desist from alleged unfair labor practices?

This question was answered in the affirmative by both the National Labor Relations Board (R. 317-339) and the Circuit Court of Appeals for the First Circuit(*infra*, p. 9), each of those tribunals having adopted the view that the National Labor Relations Act applies to the businesses of the petitioners as conducted, and therefore falls within the jurisdiction of the National Labor Relations Board.

The petitioners contend that the test of the Board's jurisdiction is in the existence of a relationship of an employer and his employees to the commerce in such a manner that unfair labor practices, if committed, will lead or tend to lead to a labor dispute burdening or obstructing commerce, and since it will be noted that in the cases at bar no effect upon commerce existed to support the Board's find-

ings of fact, the National Labor Relations Board, it is submitted, exceeded its authority in directing an order against them.

Statutes Involved.

NATIONAL LABOR RELATIONS ACT.

(Public Act No. 198, 74th Congress, approved July 5, 1935.)

Commerce.

Section 2:

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Affecting Commerce.

Section 2:

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Prevention of Unfair Labor Practices.

Section 10:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

Board Petitions to Circuit Courts of Appeal or District Courts—Findings of Facts, Conclusive—Additional Evidence—Appeals.

Section 10:

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered

by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U.S.C. title 28, secs. 346 and 347).

Petition for Review by an Aggrieved Party—Copy of Petition to the Board.

Section 10:

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been

engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

Statement.

COMPLAINT.

Charges and amended charges having been filed by the International Association of Machinists, Local No. 1017, a labor organization herein referred to as the I.A.M., the Board, by its Acting Regional Director at Boston, Massachusetts, on June 21, 1939, issued its complaints against respondents* in three separate proceedings (R. 9-14, 23-28, 34-39). In each instance the complaint alleged that the I.A.M. had been designated as their collective bargaining

*Petitioners here, where respondents appear throughout in Complaint and Board's Decision and Order.

representative by a majority of the employees in an appropriate unit, and that the respondent, by refusing to bargain collectively with the I.A.M. and by other conduct which interfered with, restrained, and coerced its employees in the exercise of their right to self-organization, had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the Act (R. 9-12, 23-26, 34-37). Each complaint also alleged that, because of the respective respondent's refusal to bargain, the I.A.M. called a strike against respondent on or about May 1, 1939, and that this strike still continued (R. 11, 25, 36).

The complaints, together with notices of hearing, were served upon respondents and the I.A.M. (R. 12-13, 26-27, 37-38, 298, 303, 308). Thereafter the Board, acting pursuant to Article II, Section 37 (b) of its Rules and Regulations—Series 1, as amended, ordered that the three proceedings be consolidated (R. 16, 299, 304, 308).

Answer.

In answer to the complaint, the respondents denied, in each instance, a commission of the unfair labor practices as alleged; the applicability of the Act to their operations; and that they were engaged in interstate commerce within the meaning of the Act (R. 18-21, 30-33, 41-44, 299, 304, 308).

Hearings.

Pursuant to amended notices (R. 17), a hearing was held at Providence, Rhode Island, in July, 1939, before a trial examiner designated by the Board (R. 21-22), each respondent being represented by counsel and participating in the hearing. On September 7, 1939, respondents, the I.A.M.,

and a representative of the Board entered into three separate stipulations (R. 298-302, 303-307, 307-311). By the terms of these stipulations, each respondent expressly consented to the issuance of an order by the Board and, upon application by the Board, to the enforcement of such order by the appropriate Circuit Court of Appeals, requiring it in stated terms to cease and desist from certain unfair labor practices and to take certain affirmative action, subject only to the right of respondent "to contest before the National Labor Relations Board and any appropriate court the applicability of the National Labor Relations Act to respondent and the employees of respondent, and by reason of the aforesaid jurisdiction of the National Labor Relations Board and appropriate Circuit Court of Appeals to enter against the respondent the order and decree" provided in the stipulations (R. 301, 306, 311). Thereafter, on October 3, 1939, the Board issued its order approving the three stipulations and transferring and continuing the consolidated cases before the Board, in accordance with the stipulations and pursuant to Article II, Section 36, of the Board's Rules and Regulations—Series 2 (R. 312-313).

Oral argument was had before the Board in Washington, D.C., on October 26, 1939, both respondents and the I.A.M. participating (R. 314-316). Thereafter, on November 28, 1939, the Board issued its Decision, setting forth its findings of fact, conclusions of law, and order (R. 316-340).

Board's Decision and Order.

The Decision and Order of the National Labor Relations Board is reported in full in the record on pages 317-339.

Upon the findings made therein, the Board concluded that the Act is applicable to the operations of each respondent and issued an order against each in the form provided in the stipulations dated September 9, 1939 (R. 298-311).

OPINION AND JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

MAHONEY, J. These consolidated cases are before this court upon petition of the National Labor Relations Board for the enforcement of an order issued against respondents pursuant to Section 10 (c)[1] of the National Labor Relations Act (49 Stat. 453 (1935), 29 U.S.C. § 160 (c) (Supp. 1938)). The jurisdiction of this court is derived from Section 10 (e)[2] of the same statute.

Each of the three respondents is a Rhode Island corporation engaged in the distribution, servicing, and repair of motor vehicles in Providence, Rhode Island, where the alleged unfair labor practices were found to have occurred. Charges were filed against each respondent by the International Association of Machinists, Local No. 1017, and the Board issued complaints charging the respondents with identical unfair labor practices. The three proceedings were thereafter consolidated, and the respondents filed answers denying the jurisdiction of the Board on the ground that they were not engaged in interstate commerce,

---

[1] "(c) Reduction of testimony to writing; findings and orders of the Board. . . . If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this chapter. . . ."

[2] "(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any circuit court of appeals of the United States . . . for the enforcement of such order. . . . Upon such filing, the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, . . ."

and denying the commission of the unfair labor practices alleged.

At the hearing before the trial examiner, all the parties entered into stipulations consenting to the entry of an order by the Board, and a petition to the Circuit Court of Appeals for its enforcement, requiring the respondents to cease and desist from the unfair labor practices charged and ordering certain affirmative action subject only to respondents' right to contest the jurisdiction of the Board.[3]

After hearing and argument, the Board issued findings of fact and conclusions of law and held that the respondents' operations constituted a continuous flow of commerce, and, therefore, were subject to the National Labor Relations Act. The Board entered the order agreed upon and has petitioned this court for enforcement. Thus, the only question before us is whether the respondents are engaged in interstate commerce or whether their unfair labor practices so "affect commerce" within the meaning of Section 10 (a)[4] of the National Labor Relations Act, *supra,* as defined in Section 2 (7)[5] of the statute.

Amply supported by uncontradicted evidence, the Board found that all three respondents are engaged in the sale, distribution, exchange, service and repair of new and used

---

[3] Such stipulations have been several times upheld. See *e.g., National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C.C.A. 7th, 1939); *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497 (C.C.A. 5th, 1939).

[4] "(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

[5] "(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

automobiles, and parts thereof. The general operations of the respondents as distributors or dealers was described as follows:

Each respondent has an agreement with a manufacturer of automobiles for the sale and distribution of the latter's automobiles within a certain sales area. These areas are not necessarily confined to any particular state. Distributors, such as the respondents, appoint dealers to represent them within their designated sales areas. Respondent Bradburn Motors Company is a distributor and dealer in automobiles, parts, accessories and equipment manufactured by the Pontiac Motor Division of the General Motors Sales Corporation, and is represented by ten Rhode Island dealers and one Massachusetts dealer. Colt-Brady Company is a distributor of and dealer in automobiles, parts, accessories and equipment manufactured by the Chrysler Corporation of Detroit, Michigan, and has seventeen Rhode Island and three Connecticut dealers. Henry Levaur, Inc. is a distributor of and dealer in automobiles, parts, accessories and equipment manufactured by the Chrysler Corporation of Detroit, Michigan, for its Desoto Division, and has thirteen dealers in Rhode Island and three in Massachusetts.

The dealers purchase from the distributors the products of the manufacturer for resale, and furnish reports of their operations to the distributors who in turn report to the manufacturers. The automobiles which are ordered from the manufacturers by the distributors for themselves and their associated dealers are shipped directly to the respondents. Title to the automobiles remains in the manufacturers until the respondents take delivery in Providence. The automobiles which are delivered by the manufacturers to the respondents are transported by railroad or truck from the factories in Michigan to Providence. From the railroad station in Providence the automobiles are driven to the respondents' places of business by their employees.

There, the automobiles are serviced by respondents' employees and made ready for delivery to individual purchasers or dealers. The sales prices of new cars established by the respondents, or their dealers, are based upon the manufacturers' list prices, and to further the sale of automobiles the manufacturers advertise in local newspapers and list the names of the respondents and their dealers. Both the manufacturers and distributors also take an active part through sales conferences in promoting the business of their dealers. The dealers buy their cars from the distributors and take delivery in Providence.

The pecuniary value of the business done by each respondent was considerable, ranging approximately from $700,000 to $1,500,000. During the period between January 1, 1938 and June 1, 1939, the respondent, Henry Levaur, Inc., purchased new cars of the value of $1,169,000. 100 per cent of these were shipped to him in interstate commerce. During the same period he exchanged with other dealers new cars, 60 per cent of which were received from dealers outside of the State of Rhode Island. 4 per cent of the used cars acquired by the respondent during the same period were received from points outside of the State, and 100 per cent of the parts and accessories were shipped from points beyond Rhode Island. 10 per cent of the new cars which the respondent sold was sold to persons or dealers outside of Rhode Island as was 60 per cent of the new cars exchanged with other dealers. 2½ per cent of the used cars sold by the respondent were sold to persons or dealers outside of the state.

A similar picture is presented by the business of the respondent Bradburn Motors Co., as the evidence showed that 97 per cent of the new cars purchased, 100 per cent of the new cars received in exchange, 100 per cent of the parts and accessories purchased, and 3 per cent of the used cars acquired, came from outside the state while 10 per cent of

the new cars sold, 60 per cent of the new cars exchanged, and 2½ per cent of the used cars sold went to purchasers or dealers having residences or places of business in states adjacent to Rhode Island.

The respondent, Colt-Brady Co., received 100 per cent of its new cars purchased, 100 per cent of its new cars received in exchange, and all its parts and accessories purchased from points without the state; and sold 5 per cent of its new cars to purchasers or dealers in states other than Rhode Island. 100 per cent of the new cars which it exchanged with other distributors, 5 per cent of its used cars sold, and 1 per cent of its parts and accessories went to out of state purchasers.

The respondents contend that they are not engaged in interstate commerce or do not so affect such commerce as to bring them under the National Labor Relations Act. To support this contention they present several arguments. They insist that their business is predominantly an intrastate retail business, that their interstate transactions are very small percentages of their total business, that they do not take title to the automobiles shipped in interstate commerce until they arrive within Rhode Island, and that they relinquish title to the purchaser before the car leaves the State. This, they claim, makes even their transactions with out of state vendors and purchasers completely intrastate sales and removed from the regulatory power of Congress.

We cannot agree with the respondents. It seems clear that they are engaged in interstate commerce and that any stoppage of their businesses because of their unfair labor practices would obstruct or burden the free flow of such commerce. The decided cases have rejected all of the respondents' contentions.

It has long been settled that activities which when separately considered are intrastate may become subject to the power of Congress when they have a close and substantial relation to interstate commerce. *Consolidated Edison Co.* v.

National Labor Relations Board, 305 U.S. 197 (1938); *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U.S. 453 (1938); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 108 F. (2d) 198 (C.C.A. 9th, 1939). The respondents clearly fall within this conception for not only do they receive all of their new inventory from out of the state but they make sales, not only to casual out of state purchasers, but to appointed dealers in states other than Rhode Island. These dealers are within the designated sales area of the respondents, are bound by contract to do business with the manufacturer through the respondents, and are in many ways tied to them. The contention that an interference with the business of any one of the respondents would not affect interstate commerce is plainly untenable. A labor dispute which would curtail the sales of respondents would cut down the percentage sold to out of state purchasers or dealers, would prevent the free exchange of new cars, and would affect the receipt of automobiles from the manufacturer. Clearly such curtailment affects interstate commerce.

We do not rely on the fact that 100 per cent of respondents' purchases of new cars are shipped to respondents from without the state, though there is considerable authority that that fact alone would be sufficient to subject respondents to the National Labor Relations Act. *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841 (C.C.A. 4th, 1939), rev'd on other grounds, 308 U.S. 241 (1939); *National Labor Relations Board* v. *Norfolk Shipbuilding & Dry Dock Corp.,* 109 F. (2d) 128 (C.C.A. 4th, 1940); *National Labor Relations Board* v. *A. S. Abell Co.,* 97 F. (2d) 951 (C.C.A. 4th, 1938); *cf. Santa Cruz Co.* v. *National Labor Relations Board, supra.*

Laying aside any consideration of the source of the automobiles sold by the respondents, they are still deliberately engaged in interstate transactions with associated dealers. *Santa Cruz Co.* v. *National Labor Relations Board, supra*; *cf. Consolidated Edison Co.* v. *National Labor Relations Board, supra.* Respondents are integral parts in the distribution of automobiles in interstate commerce and maintain contractual connections with out of state dealers to further interstate sales. *Cf. Carter Carburetor Mining Corp.* v. *Federal Trade Commission,* 112 F. (2d) 722 (C.C.A. 8th, 1940). No "flow" of interstate commerce is necessary to subject an enterprise to the National Labor Relations Act since burdens on such commerce can result from intrastate acts irrespective of the origin of the materials or the place where the sale is made. *Clover Fork Coal Co.* v. *National Labor Relations Board,* 97 F. (2d) 331 (C.C.A. 6th, 1938).

It is not in the least significant that the sales are so made that title passes to the purchaser within Rhode Island. It has long been held that a sale involving interstate transportation is not removed from Congressional regulation because the sale itself is intrastate, either before or after the transportation. *Currin* v. *Wallace,* 306 U.S. 1 (1939); *Lemke* v. *Farmers Grain Co.,* 258 U.S. 50 (1922); *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282 (1921). This reasoning has been explicitly applied to jurisdiction under the National Labor Relations Act, the Supreme Court saying "And the place where the manufacturer makes his sales is not controlling if the sales in fact are in interstate commerce". *Santa Cruz Co.* v. *National Labor Relations Board, supra,* at page 465. See also *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601 (1939); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra*; *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. (2d) 780 (C.C.A. 9th, 1940); *cf. Carter Carburetor Mining Corp.* v. *Federal Trade Commission, supra.*

The fact that the interstate transactions of the respondents are only a small percentage of the entire business of respondents is not material since the test of applicability of the National Labor Relations Act is not the percentage of business done but the effect on interstate commerce. *Santa Cruz Co.* v. *National Labor Relations Board, supra*; *National Labor Relations Board* v. *Fainblatt, supra*; *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. (2d) 38 (C.C.A. 6th, 1940); *Southern Colorado Power Co.* v. *National Labor Relations Board,* 111 F. (2d) 539 (C.C.A. 10th, 1940).

Finally, respondents contend that the strike called by their employees in 1939 and quickly abandoned actually did not interfere with interstate commerce, and that even if a strike were successful the interstate business could be otherwise handled so as to prevent its disruption. Such contentions have no merit and have previously been denied. *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U.S. 318, 326 (1940); *Southern Colorado Power Co.* v. *National Labor Relations Board, supra; North Whittier Heights Citrus Assoc.* v. *National Labor Relations Board,* 109 F. (2d) 76, 81-82 (C.C.A. 9th, 1940); *cf. Virginian Ry.* v. *System Federation No. 40,* 300 U.S. 515, 557 (1937); *McCall* v. *California,* 136 U.S. 104, 111 (1890). Since the purpose of the Act is to protect interstate commerce from disruption, Congress can act before the disruption occurs to prevent unfair labor practices if they would tend to lead to labor disputes which threaten to obstruct interstate commerce. *National Labor Relations Board* v. *Bradford Dyeing Association, supra*; *Consolidated Edison Co.* v. *National Labor Relations Board, supra*; *Clover Fork Coal Co.* v. *National Labor Relations Board, supra.* If the Board can act before any disruption occurs, it would indeed be a strange situation if an employer could obtain immunity from the jurisdiction of the Board by provoking a labor dispute and

securing its settlement before it affected the interstate commerce involved. Thus, the respondents' contention that the failure of the strike to affect interstate commerce prevents attachment of the Board's jurisdiction must be rejected.

Respondents, disregarding their interstate purchases, are engaged in the interstate sale of automobiles both to individual customers and to contractually associated dealers in states other than Rhode Island. We hold that their unfair labor practices might lead or tend to lead to labor disputes which threaten to obstruct such interstate transactions. In such circumstances the respondents are clearly subject to the jurisdiction of the National Labor Relations Board which properly entered the order agreed upon by the parties in their stipulations. The Board's petition for enforcement is, therefore, granted, and a decree will be entered enforcing the order of the Board.

Petitioners' Contentions.

1. The Congressional power granted by Congress to the National Labor Relations Board through the National Labor Relations Act does not grant to the National Labor Relations Board the power to regulate interstate commerce (Supporting Brief, *infra*, p. 23).

2. The Congressional power granted, through the National Labor Relations Act to the National Labor Relations Board, only extends to situations and matters which have an effect upon commerce within the meaning of the National Labor Relations Act (Supporting Brief, *infra*, pp. 24, 25, 26).

3. As to the view adopted by the learned Circuit Court of Appeals to the effect that "we do not rely on the fact that 100% of the respondents' [petitioners' here] purchases of new cars are shipped to respondents [petitioners here] from without the state, though there is considerable

authority that that fact alone would be sufficient to subject respondents [petitioners here] to the National Labor Relations Act," *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841 (C.C.A. 4th, 1939), rev'd on other grounds, 308 U.S. 241 (1939); *National Labor Relations Board* v. *Norfolk Shipbuilding & Dry Dock Corp.,* 109 F. (2d) 128 (C.C.A. 4th, 1940); *National Labor Relations Board* v. *A. S. Abell Co.,* 97 F. (2d) 951 (C.C.A. 4th, 1938); cf. *Santa Cruz Co.* v. *National Labor Relations Board,* 303 U.S. 453; it appears that the learned Circuit Court of Appeals has made no attempt to apply the facts in the cases at bar to the law involved, as hereinafter set forth in detail (Supporting Brief, *infra,* pp. 26-27).

4. The learned Circuit Court of Appeals has also adopted a peculiar view to the evidence inasmuch as they state "respondents [petitioners here] contend that the strike called by their employees in 1939 and quickly abandoned actually did not interfere with interstate commerce, and that even if a strike were successful the interstate business could be otherwise handled so as to prevent its disruption." This view is not supported by the evidence in the cases at bar (Supporting Brief, *infra,* p. 26).

5. Since the purpose of the Act is to protect interstate commerce from disruption, Congress can act before the disruption occurs to prevent unfair labor practices if they would tend to lead to labor disputes which threaten to obstruct interstate commerce; *National Labor Relations Board* v. *Bradford Dyeing Association, supra*; *Consolidated Edison Co.* v. *National Labor Relations Board, supra*; *Clover Fork Coal Co.* v. *National Labor Relations Board, supra*; but such an act by the Board must be based upon the facts in the individual cases before it, and the evidence must support a finding in the instant matters that the alleged unfair labor practices complained of would tend to lead to labor disputes which threaten to obstruct interstate commerce.

In the absence of such evidence, and the petitioners herein contend the evidence to be contrary to the findings made, the Congressional power granted through the National Labor Relations Act to the National Labor Relations Board has been exceeded (Supporting Brief, *infra*, pp. 27-28).

6. It is the contention of the petitioners that, unless they hire, operate, or control agents or agencies to transmit goods or merchandise to the several States, they are not engaged in interstate commerce within the meaning of the National Labor Relations Act, and the mere purchase of articles for resale from the several States does not *per se* make the purchaser thereof directly or indirectly engaged in interstate commerce (Supporting Brief, *infra*, pp. 28-29).

Reasons for Granting the Writ.

The Congress of the United States, which has the power to regulate interstate commerce, has delegated certain of its regulatory powers through the National Labor Relations Act to the National Labor Relations Board. The power thus delegated to the Board grants to it such powers as Congress itself has to regulate certain unfair labor practices which have an effect upon interstate commerce. If it were sufficient for the Board to assume jurisdiction over the petitioners by reason of the fact that they made purchases from the various States of their commodity, which they resold in their own State, then it must necessarily be assumed that, without more, Congress had intended to grant to the National Labor Relations Act, and through it to the National Labor Relations Board, the power to regulate interstate commerce. This, by the decided cases, is not so. Therefore the only Congressional power that extends to the National Labor Relations Board by virtue of the provisions

of the National Labor Relations Act is unfair labor practices which lead or tend to lead to labor disputes which threaten to obstruct interstate commerce. The petitioners maintain that the evidence in the cases before the learned Circuit Court of Appeals is controlling, and since the evidence before the Court was that the unfair labor practices *resulted* in a labor dispute, and that said labor dispute *did not threaten* or obstruct such interstate commerce, an assumption of non-existing facts as to what might happen in the future under different circumstances and conditions was an erroneous one, and that the jurisdiction of the National Labor Relations Board has failed to attach to the instant cases on the evidence in the record as presented. The contention of the learned Circuit Court of Appeals, "thus the respondents' [petitioners' here] contention that the failure of the strike to effect interstate commerce prevents attachment of the Board's jurisdiction must be rejected," is not consistent with the intent of Congress and is without merit.

If the several States are not enlightened as to whether or not the Congressional power under discussion here extends to labor disputes which do not affect or threaten to obstruct interstate commerce, it is reasonable to assume that many conflicting decisions will arise by reason of the ambiguity of the language in the decided cases, particularly since the several Circuit Courts of Appeals have shown an apparent willingness to decide these cases, as well as others, on the dicta of this Court.

As a further reason for the granting of the writ, your petitioners respectfully urge that certiorari might well be granted by this Court almost as a matter of course to review judgments of the Circuit Court of Appeals in cases which, like these, bring forth an issue which is the vital purpose of the National Labor Relations Act, and which no longer affects manufacturers and processors, but as in these cases

extends also to retail establishments selling nationally advertised products and commodities within certain territories, and thus, by the process of elimination and the misinterpretation of dicta in the decided cases, might, if allowed to be extended further, do away with intrastate commerce.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the several States, as well as the public, may know the true intent of Congress on the questions as presented, and that to such end a writ of certiorari should be granted, and this Court should review the Decision of the Circuit Court of Appeals for the First Circuit and finally reverse it.

Respectfully submitted,

ALLAN SESERMAN,

Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinions.

Before the National Labor Relations Board, the case was disposed of by an order against the petitioners based upon findings of facts resulting from a hearing, all in accordance with rules and regulations as provided. This order is reported in full in the record on pages 317-339.

The opinion of the Circuit Court of Appeals, delivered by Circuit Judge Mahoney on October 25, 1940, enforcing the order of the National Labor Relations Board, is reported herein on pages 9-17, inclusive.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act (Public Act No. 198, 74th Congress, approved July 5, 1935), *supra*, pp. 4-5.

Questions Presented.

These are stated in the Petition, *supra*, pp. 2-3.

Statutes Involved.

These are indicated in the Petition, *supra*, pp. 3-6.

Statement.

A statement of the case appears in the Petition, *supra*, pp. 6-7.

Errors to be Relied Upon.

The Circuit Court of Appeals erred—

1. In holding that the petitioners are engaged in interstate commerce within the meaning of the National Labor Relations Act.

2. In holding that no effect upon commerce need be shown in order for the National Labor Relations Board to direct an order against the petitioners.

3. In enforcing the order of the National Labor Relations Board against the petitioners.

Summary of Argument.

A concise summary of the ensuing argument is set forth in the foregoing Petition, under the heading of "Petitioners' Contentions" (*supra*, pp. 17-19).

Argument.

POINT I.

The Congressional power granted by Congress to the National Labor Relations Board through the National Labor Relations Act was not given for the purpose of regulating interstate commerce, but was to exercise the authority Congress had to facilitate the amicable settlement of disputes which threatened the service of the necessary agencies of interstate transportation. It was this reasoning which supported the decisions in the following cases:

Texas N. O. R. Co. v. *Brotherhood of Railway Steamship Clerks*, 281 U.S. 548.

Virginian Railway Co. v. *System Federation No. 40*, 300 U.S. 515.

Associated Press v. *National Labor Relations Board*, 301 U.S. 103.

Schechter Poultry Corp v. *United States*, 295 U.S. 495 (reversing in part and affirming in part 8 Fed. Supp. 136, and reversing 76 F. (2d) 617).

The above-cited cases support the contention of the petitioners that interstate commerce must first be established in order that the effects of a labor dispute, which might arise, may show a burden or obstruction of that commerce.

Kindly note in the case of *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U.S. 142, which company undoubtedly was engaged in interstate transportation for hire, the Court held that the National Labor Relations Act "limits the jurisdiction of the Board to *instances* which fall within commerce power, and if the Board should exceed the jurisdiction conferred upon it, any party aggrieved is at liberty to challenge its action." See also *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, in which case the employees involved were mechanics who repaired buses of their own company engaged in interstate transportation and in which case the Court said: "Such servicing is essential to the safe and regular functioning of the system." In the cases at bar the services rendered by the employees herein involved are not, on the evidence in the record, necessary for the regular functioning of the businesses of the petitioners in so far as the sales of motor vehicles, parts, accessories, and equipment are concerned.

In the *Denver Automobile Cases* (10 N.L.R.B. 1173), which the Board relied upon in making its decision and order, it is called to the attention of the Court that in answers filed by the respondents in those cases they admitted transporting automobiles over state lines in making deliveries to their customers and to their respective dealers.

In *In re Shierbrock Motors* (15 N.L.R.B. 120) the Board itself makes the distinction by placing credence upon the fact that "the deliveries were made by the particular distributors to associated dealers located outside the State lines."

Point II.

Since the Congressional power granted to the Board can only attach to matters which affect commerce, it must necessarily follow that the fact-finding body must determine sufficient facts supported by evidence that this commerce is affected or there exists sufficient evidence to warrant a finding of fact that the aforementioned commerce will be threatened.

Senate Committee Report No. 572:

> "Insofar as the N.L.R.B. is concerned, the power to regulate interstate commerce under the N.L.R.A. is confined only to matters that burden, effect or obstruct interstate commerce or which have led or tend to lead to labor disputes that might have such effect upon interstate commerce."

In support of the Senate Committee Report the Court in the case of the Jones & Laughlin Steel Corporation said: "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce, and, thus qualified, it must be considered as contemplating the exercise of control within constitutional bounds."

This language is important, since it conveys sufficient authority to assume that it is not industry that the Act seeks to control, but the individual activities, if any as qualified, with emphasis upon the effects on interstate or foreign commerce. Hence, it is logical that persons engaged in the same industry do not necessarily come within the jurisdictional power of the National Labor Relations

Act unless the individual facts establish an obstruction, burden, or effect upon interstate commerce.

The petitioners respectfully submit that the Board has failed to show any findings supported by evidence that the activities of the petitioners have had or may have any effect upon commerce within the meaning of the National Labor Relations Act. On the contrary, the evidence will substantiate the fact that a strike was in progress for approximately ten weeks from May 1, 1939, to July 6, 1939, and that during that period the businesses of the respective petitioners had increased substantially over the corresponding period of the previous year, when no industrial strife was present (R. 110, 153, 192).

The learned Circuit Court of Appeals in this regard says as follows: "Finally, respondents contend that the strike called by their employees in 1939 and quickly abandoned actually did not interfere with interstate commerce and that even if a strike were successful the interstate business could be otherwise handled so as to prevent its disruption. Such contentions have no merit and have previously been denied." In this regard the petitioners respectfully submit that a strike of the duration of ten weeks or more cannot be referred to as a strike quickly abandoned, and that, in so far as the statement of the learned Circuit Court of Appeals is concerned relative to the business being otherwise handled, your petitioners contend that there is no evidence in the record to support that contention.

Point III.

In regard to the view adopted by the learned Circuit Court of Appeals to the effect that "we do not rely on the fact that 100% of respondents' purchases of new cars are shipped to respondents from without the state," your petitioners respectfully contend that this conclusion by the learned

Circuit Court of Appeals is incorrect, and that the cases cited by the learned Circuit Court of Appeals are not in support of that contention, for the following reasons:

In the cases cited by the learned Circuit Court of Appeals, one of the parties in each of the cases cited is a manufacturer or processor of merchandise, which ultimately finds itself in interstate commerce or as an agency of such commerce.

National Labor Relations Board v. *Bradford Dyeing Association, supra.*

Consolidated Edison Co. v. *National Labor Relations Board, supra.*

National Labor Relations Board v. *Jones & Laughlin Steel Corp., supra.*

Santa Cruz Fruit Packing Co. v. *National Labor Relations Board, supra.*

The only evidence in the cases at bar which might give credence to the contention that the products sold by the petitioners are used in interstate commerce is the allegation by the Board that the petitioners sell trucks, and the petitioners submit that there is no evidence in the record to support that contention and refer this Court to the Circuit Court of Appeals decision, *supra,* p. 10, which supports the petitioners' contention on that point.

S. S. Kresge Co. v. *Amsler,* 99 Fed. 503 (U.S. D.C. E.D. Mo.).

Compare *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U.S. 58.

Point IV.

It appears that the learned Circuit Court of Appeals, as well as the National Labor Relations Board, has relied to

a great measure upon the decision of this Court in *National Labor Relations Board* v. *Bradford Dyeing Association, supra.* In this connection, it is the contention of the petitioners to point out, *first,* that the Bradford Dyeing Association were processors; *second,* the findings of fact by the Board that in the event of industrial strife the plant would be closed and therefore the inference that interstate commerce would be obstructed was a proper one is not analogous to the facts that were presented before the learned Circuit Court of Appeals in these cases. The petitioners refer to the language of this Court in that case when it said: "Since the purpose of the Act is to protect and foster interstate commerce, the Board's jurisdiction can attach before actual industrial strife materializes to obstruct that commerce." The petitioners submit that, in the cases at bar, *the industrial strife actually occurred* and the facts remain uncontradicted that no effect upon commerce existed, *first,* because the employees involved had no connection with that commerce, and *second,* that the petitioners did not transmit, ship, or deliver any of their merchandise across state lines, and *third,* that the petitioners did not engage, hire, or operate any vehicles, trucks, or agencies in transporting any of the wares that they purchased and sold.

Distinguish from the following: A local newspaper company which delivers only 17.3 per cent of its total circulation outside the State of publication is subject to the Act where a stoppage of its activities would directly affect interstate commerce. The nature of the particular business is immaterial; it is the effect of the unfair labor practices on interstate commerce which is the controlling factor. The court in reaching its decision said that ". . . the nature of the particular business or activity is immaterial. If a person, no matter what the character of his business is, engages in an unfair labor practice which affects commerce, the Board may assume jurisdiction of the matter. It is the

effect of the unfair labor practices on commerce which is the controlling factor . . . In the instant case, the strike halted interstate shipments. Such cessation was a direct result of the strike. It is therefore clear that the unfair labor practices directly affected interstate commerce."

National Labor Relations Board v. *Hearst et al.* (C.C.A. 9, 1939).

Point V.

The Congressional power to regulate interstate commerce as heretofore mentioned, of course, does not apply unless there be an agency of transmission of such goods to the several States. To argue otherwise would be to destroy intrastate commerce in its entirety, and since this Court has said that intrastate commerce still exists, we must assume that a retailer of goods is expected to sell his wares for local consumption, and the mere fact that a person residing in another State, while passing through the jurisdiction where the petitioners maintain their businesses makes a purchase, is purely incidental, and as far as Congressional power to regulate is concerned, there can be none, since this transaction is purely local. Were this not so, every newsdealer selling out-of-town newspapers to persons undoubtedly from out of town seeking home news would be engaged in interstate commerce; likewise, cigar and cigarette stands and other like enterprises.

The Board, as well as the Circuit Court of Appeals, has attempted to make much of the fact that the petitioners sell nationally advertised products. So do every well-known department store, men's furnishing shop, hat stores, and other retail establishments. The petitioners submit that not only do these facts fail to support the question of jurisdiction singly, but together they fall far short of all the elements necessary under the National Labor Relations Act

for the Board or the Circuit Court of Appeals to claim jurisdiction over the petitioners.

National Labor Relations Board v. *Fainblatt*, 306 U.S. 601.

Consumers Power Co. v. *National Labor Relations Board*, 113 F. (2d) 38.

In applying the language of this Court in the decided cases, it is the contention of the petitioners that, in order for them to come within the provisions of the National Labor Relations Act, the National Labor Relations Board and the Circuit Court of Appeals for the First Circuit must find and affirm as facts:

1. That the petitioners regularly ship their goods in interstate commerce; and

2. That the unfair labor practices have led or tend to lead to labor disputes which threaten to obstruct these shipments.

Both these points are refuted in this brief and by the record in the transcript of evidence.

Point VI.

The petitioners are Rhode Island corporations with principal places of business located at Providence, Rhode Island, and they are engaged in the purchase, sale, exchange, servicing, and repairing of new and used motor vehicles, parts, accessories, and equipment. There is no evidence in the record that the petitioners sell or distribute trucks. Each petitioner is known in the trade as a distributor or direct dealer and operates his respective business under a franchise given to him by his manufacturer. A close examination of the record will show that by far the greater portion of the petitioners' businesses is the

retail sale of motor vehicles and accessories, while the area granted to each petitioner by the manufacturer in which to conduct its business, in so far as the appointment of associate dealers is concerned, has little or no regard to state lines; the power to make such appointments and cover such areas rests with the petitioners.

Under the aforementioned franchises, the petitioners have made contracts with dealers. While it is true that the manufacturers require all their dealers to comply with certain regulations in form, they do not exercise any control over the petitioners' businesses nor do the petitioners in turn have any right to exercise any control over the operations of their dealers and their service stations. In all cases the petitioners take delivery of the motor vehicles purchased in the State of Rhode Island and have no right to exercise control over the merchandise while in transit (R. 73, 86, 122, 123, 168, 178, 182, 183). The petitioners make all deliveries of new and used motor vehicles, parts, and accessories purchased from them, at their respective places of businesses in the State of Rhode Island, and do not transport, ship, nor deliver said motor vehicles, parts, or accessories to any persons or firms located outside the State of Rhode Island (R. 75, 126, 182).

Conclusion.

To the 50,000 or more persons and concerns engaged in the business of purchasing and selling automobiles, it will seem a strange miscarriage and perversion of justice if, upon the decided cases referring to manufacturers and processors, the dicta therein shall be controlling to such an extent that persons engaged in purchasing and selling a commodity, such as the petitioners, are to be held to be engaged in interstate commerce within the meaning and provisions of the National Labor Relations Act.

It also appears to the petitioners that even though, as in the instant cases, the National Labor Relations Board, as well as the Circuit Court of Appeals, agrees that the petitioners are engaged in interstate commerce, it would seem that, in the absence of supporting evidence that a labor dispute had in fact threatened or obstructed interstate commerce, the National Labor Relations Board was without power to direct an order against them. This would be the natural result in the cases at bar if the evidence before the Board as recorded in the transcript of the record is controlling. The petitioners contend that this evidence must be controlling and that the Circuit Court of Appeals erred in refusing to give credence to the facts in the transcript and that the Board based its findings of fact upon matters not contained in the record and there was no evidence in the transcript of the record to support the findings made.

The Decision and Order of the National Labor Relations Board should be vacated, and the Order of the Circuit Court of Appeals for the First Circuit reversed.

Respectfully submitted,

ALLAN SESERMAN,
Attorney for Petitioners.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	8
Appendix	9

Cases:

CITATIONS

Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	7
Consumers Power Co. v. *National Labor Relations Board*, 113 F. (2d) 38	7
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282	6
Lemke v. *Farmers Grain Co.*, 258 U. S. 50	6
Local 167, Brotherhood of Teamsters v. *United States*, 291 U. S. 293	6
National Labor Relations Board v. *A. S. Abell Co.*, 97 F. (2d) 951	7
National Labor Relations Board v. *Bradford Dyeing Assn.*, 310 U. S. 318	6, 8
National Labor Relatitns Board v. *Fainblatt*, 306 U. S. 601	6
National Labor Relations Board v. *Fruehauf Trailer Co.*, 301 U. S. 49	8
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1	8
National Labor Relations Board v. *Norfolk Shipbuilding & Drydock Corp.*, 109 F. (2d) 128	7
National Labor Relations Board v. *Sunshine Mining Co.*, 110 F. (2d) 780	7
Newport News Shipbuilding & Dry Dock Co. v. *National Labor Relations Board*, 101 F. (2d) 841, modified and affirmed, 308 U. S. 241	7
Santa Cruz Fruit Packing Co. v. *National Labor Relations Board*, 303 U. S. 453	6
Southern Colorado Power Co. v. *National Labor Relations Board*, 111 F. (2d) 539	7

Cases—Continued. Page

United States v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 ---- 6

Virginia Electric and Power Co. v. *National Labor Relations Board* (C. C. A. 4th), decided November 12, 1940 ---- 7

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

Section 1 ---- 7

Section 10 ---- 2

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 621

HENRY LEVAUR, INC., COLT-BRADY COMPANY, AND BRADBURN MOTORS COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 351–358) is reported in 115 F. (2d) 105. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 316–340) are reported in 17 N. L. R. B. 1034.

JURISDICTION

The decree of the court below (R. 358–359) was entered on October 25, 1940. The petition for a writ of certiorari was filed on December 12, 1940.

The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act (Pet. 22).

QUESTION PRESENTED

Whether the National Labor Relations Act applies to employers whose business consists of the purchase and sale of motor vehicles, parts and accessories, which are in large part delivered to them through the channels of interstate commerce and substantial amounts of which are in turn disposed of by them to persons located outside the State wherein the employers' places of business are situated.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Supp. V, Sec. 151, *et seq.*) are set forth at pages 3–6 of the petition.

STATEMENT

Upon proceedings had pursuant to Section 10 of the National Labor Relations Act,[1] the Board

---

[1] These proceedings were: Charges and amended charges filed by the International Association of Machinists, Local No. 1017 (R. 13–14, 27–28, 38–39); a separate complaint issued by the Board against each petitioner (R. 9–13, 23–27, 34–38); answers (R. 18–21, 30–33, 41–44); an order of the Board consolidating the cases (R. 16); a hearing before a trial examiner (R. 45, *et seq.*); a stipulation between the Board and each petitioner for the entry by the Board, and enforcement by the Circuit Court of Appeals, of a specified

issued its findings of fact, conclusions of law, and order (R. 316–340). The Board's findings of fact relate solely to the applicability of the Act to petitioners' operations, enforcement of a specified order having been stipulated subject only to petitioners' right to contest the applicability of the Act to them (see note 1, p. 2, *supra*). The facts, as found by the Board and as shown by the undisputed evidence, may be summarized as follows: [2]

Each petitioner has its principal place of business at Providence, Rhode Island, and is engaged in the purchase, sale, exchange, servicing, and repair, of motor vehicles, parts and accessories (R. 332; R. 299, 304, 308–309). Petitioners are what is known to the trade as "distributors," that is, they operate under agreements with manufacturers of automobiles and accessories for the sale and distribution of the manufacturers' products within sales areas specified in the agreements (R. 332; R. 63–65, 194–196, 200–237, 239–260, 279–297). Each petitioner, with the approval of the manufacturer, allots to various "dealers" portions of its assigned sales area (R. 332; R. 216–217, 244, 283). Petitioner Henry Levaur, Inc.,

---

order, subject only to the petitioner's right to contest the applicability of the Act to its business (R. 298–302, 303–307, 307–311); an order of the Board approving each of the stipulations (R. 312–313); and oral argument before the Board (R. 314–316).

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

has within its sales area 13 dealers in Rhode Island and 3 in Massachusetts (R. 335; R. 175–176); Bradburn Motors Company has 10 dealers in Rhode Island and 1 in Massachusetts (R. 333; R. 69); Colt-Brady Company has 17 dealers in Rhode Island and 3 in Connecticut (R. 334; R. 118–119). Automobiles to meet the sales requirements of the distributor's sales area are customarily purchased by the distributor from the manufacturer and are transported by railway or truck in interstate commerce to the distributor, which receives and "services" them [3] in preparation for delivery to its dealers or to individual retail purchasers (R. 332–333; R. 71–74, 78–79, 111–113, 119–123, 125, 177–180). Delivery is normally made to the dealers, as well as to individual retail purchasers, at the place of business of each petitioner (R. 332; R. 73, 114, 122, 181–182). Each petitioner also regularly exchanges cars with other distributors, both within and without the State (R. 333, 334, 335; R. 86–88, 127–128, 181).

---

[3] This operation consists of tightening the body, tuning the motor, inspecting the brakes, lights, and mechanical parts, washing and polishing, etc. Bradburn Motors Company, alone, of the petitioners, usually omits this servicing operation in the case of cars sold to associated dealers (R. 74).

The employees who perform these servicing operations, as well as those who unload and drive the cars from the point of arrival to petitioners' places of business or warehouses, are members of petitioners' servicing, repair, and maintenance staffs, which, by stipulation, in the case of each petitioner constitute a unit appropriate for collective bargaining (R. 333; R. 111–112, 119–120, 178–179, 299, 304, 309).

Nearly all of the automobiles, parts, and accessories purchased or obtained in exchanges by each petitioner, come to it through the channels of interstate commerce (R. 333–335; Appendix, p. 9, *infra*).[4] Substantial amounts of the products received by each petitioner are thereafter sold to or exchanged with dealers, distributors, and individual purchasers located outside the State of Rhode Island (*ibid.*).

The Board concluded that the operations of each petitioner constituted "a continuous flow of trade, traffic, and commerce among the several States," and issued an order against each petitioner in the form provided in the stipulation (R. 336–339; note 1, p. 2, *supra*). Pursuant to the Board's petition for enforcement (R. 1–8), the court below, on October 25, 1940, handed down its opinion and entered

[4] For the convenience of the Court, we have set forth in tabulated form in the Appendix the number and approximate value of (a) new cars purchased and shipped to each petitioner from outside the State; (b) new cars received in exchanges from other distributors located outside the State; (c) used cars acquired from owners located outside the State; and (d) parts and accessories received from outside the State. The Appendix likewise shows the number and approximate value of (a) new cars sold to dealers and retail customers located outside the State; (b) new cars exchanged to distributors located outside the State; (c) used cars sold to purchasers located outside the State; and (d) parts and accessories sold to purchasers located outside the State. As to each type of transaction, the proportion, by value, of the interstate dealings to the total volume of the petitioner's transactions of that type, is also set forth. The period covered is from January 1938 to June 1939. The computations are based on the undisputed testimony of petitioners' officials (R. 76–92, 124–133, 180–184).

its decree enforcing the Board's order against each petitioner (R. 351–359).

ARGUMENT

1. By their sales and exchanges of substantial quantities of cars and accessories to out-of-State dealers and individual purchasers, petitioners are engaged in interstate commerce; the Act is therefore plainly applicable to their operations. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 463; *cf. United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533, 568–569. Petitioners' apparent reliance (Pet.19, 30, 31) upon the fact that they do not themselves transport the commodities to the destination in other States but make delivery within the State of Rhode Island, is plainly mistaken. *Santa Cruz* and *Rock Royal* cases, *supra; National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 605–606; *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318, 326.

2. A further basis for application of the Act to petitioners' enterprises—a basis which the court below expressly laid to one side (R. 356, 358)—is afforded by petitioners' receipt in interstate commerce of large quantities of automobiles and accessories. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290–291; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50, 54; *Local 167, Brotherhood of Teamsters* v. *United States,* 291 U. S. 293, 297. The Circuit Courts of Appeals have uniformly

held, in cases arising under the National Labor Relations Act, that the threat of obstruction to a flow of interstate commerce by labor disputes arising in the State of destination warrants application of the Act. *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board,* 101 F. (2d) 841, 843 (C. C. A. 4), modified and affirmed, 308 U. S. 241; *National Labor Relations Board* v. *A. S. Abell Co.,* 97 F. (2d) 951, 955 (C. C. A. 4); *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Corp.,* 109 F. (2d) 128, 129 (C. C. A. 4); *Virginia Electric and Power Co.* v. *National Labor Relations Board,* decided November 12, 1940 (C. C. A. 4); *Consumers Power Co.* v. *National Labor Relations Board,* 113 F. (2d) 38, 40 (C. C. A. 6); *National Labor Relations Board* v. *Sunshine Mining Company,* 110 F. (2d) 780, 784 (C. C. A. 9); *Southern Colorado Power Co.* v. *National Labor Relations Board,* 111 F. (2d) 539, 543 (C. C. A. 10). There are no contrary decisions.

3. The contention (Pet. 32) that even if petitioners are "engaged in interstate commerce," the Board was without power to issue an order against them "in the absence of supporting evidence that a labor dispute had in fact threatened or obstructed interstate commerce," is plainly without merit. The Act itself establishes the nexus between unfair labor practices and a burdening effect upon interstate commerce (Section 1) and application of the Act need not await realization of that effect. *Con-*

solidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197, 222; *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 326.[5]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

ROBERT B. WATTS,
General Counsel,
LAURENCE A. KNAPP,
Associate General Counsel,
MORTIMER B. WOLF,
LEWIS M. GILL,
Attorneys,
National Labor Relations Board.

JANUARY 1941.

---

[5] For the same reason, the assertion (Pet. 26) that a strike by petitioners' employees during 1939 did not diminish the quantity of business of any of the petitioners, is beside the point, as the court below observed (R. 358). Petitioners do not question the basis of the Act as an exercise of the Federal commerce power, namely, that it applies to prevent unfair labor practices found by Congress to be sources of industrial strife which burdens commerce. *Cf. National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 43; *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49, 56. The fact that in a single instance a strike has not obstructed shipments in commerce does not indicate that the premise upon which Congress grounded the statute will not prove valid if another industrial dispute arises between any of the petitioners and its employees.

A. HENRY LEVAUR, INC. (R. 180-184)

	Received		Approximate percentage by value of total volume of business		Delivered		Approximate percentage by value of total volume of business
	No.	Approximate value			No.	Approximate value	
New cars purchased	1,544	$1,169,000.00	100%	New cars sold	172	$120,000.00	10%
New cars received in exchanges	109	76,000.00	60%	New cars exchanged to other distributors	109	76,000.00	60%
Used cars acquired	25	7,500.00	4%	Used cars sold	17	5,100.00	2½%
Parts and accessories purchased	------	47,891.00	100%	Parts and accessories sold	------	------	------

B. BRADBURN MOTORS CO. (R. 76-92)

New cars purchased	954	$637,346.47	97%	New cars sold	53	$40,659.57	5%
New cars received in exchanges	29	------	100%	New cars exchanged to other distributors	29	------	100%
Used cars acquired	24	4,658.63	3%	Used cars sold	24	8,303.00	4%
Parts and accessories purchased	------	53,718.00	100%	Parts and accessories sold	------	6,336.00	11%

C. COLT-BRADY CO. (R. 124-133)

New cars purchased	1,920	$1,346,157.00	100%	New cars sold	99	$67,500.00	5%
New cars received in exchanges	72	50,000.00	100%	New cars exchanged to other distributors	72	50,000.00	100%
Used cars acquired	73	17,000.00	8%	Used cars sold	51	12,500.00	5%
Parts and accessories purchased	------	71,267.41	100%	Parts and accessories sold	------	1,115.00	1%

U. S. GOVERNMENT PRINTING OFFICE: 1941